United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-2154

To be argued by
FRANK H. SANTORO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2154

ROBERT WILLIAM GORMAN,
Appellant,

—v.—

UNITED STATES OF AMERICA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-2154

ROBERT WILLIAM GORMAN,

Appellant,

—v.—

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLEE

STATEMENT OF THE CASE

Procedural History

On or about August 9, 1977, the Appellant, Mr. Gorman, filed a Petition under 28 U.S.C. § 2255 alleging that the recent denial of his parole and his original sentence were tainted by alleged misinformation in his presentence report. Pursuant to an Order to Show Cause, the Government filed a Response on September 2, 1977 which included, *inter alia*, an Affidavit and Hearing Summary of the United States Parole Commission. Mr. Gorman filed a Traverse on September 19, 1977 and on November 30, 1977, the Court entered a Memorandum of Decision denying relief on all grounds with the exception of an Order to the Probation Office to retrieve and expunge the alleged inaccurate information in the Pre-

Sentence Report. Judgment was entered accordingly on December 1, 1977 and this Appeal followed.[1]

Statement of the Facts

Mr. Gorman was tried and convicted by a Jury of Bank Robbery in the United States District Court for the District of Connecticut. He was sentenced to a term of fifteen years on Count One and to probation on Count Two in 1965. This conviction was affirmed on Appeal without challenge to the sentence. *United States* v. *Gorman*, 355 F.2d 151 (Second Cir. 1965), *cert. denied*, 384 U.S. 1024 (1966). The sentence was subsequently modified slightly when the Court of Appeals for the Second Circuit vacated the imposition of probation on the second count, leaving the fifteen (15) year term intact. *Gorman* v. *United States*, 456 F.2d 1258 (2d Cir. 1972).

Mr. Gorman was subsequently sentenced to a consecutive fifteen (15) year sentence for Bank Robbery in the District Court of Rhode Island on July 25, 1966 and further to a ten (10) year consecutive sentence for attempt to cause a mutiny and attempted escape by the U.S. District Court for the District of Northern Georgia on October 17, 1969. He is presently serving an aggregated forty (40) year sentence at the United States Penitentiary at Leavenworth.

Mr. Gorman had his initial parole hearing on June 15, 1976. Parole was denied at that time.

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[1] The Government has learned from the Clerk's Office of the Court of Appeals for the Second Circuit that an Appendix is being reconstructed for the Appellant based on the Record. The Government submits as a limited appendix to this Brief the Affidavit and Hearing Summary of the Parole Commission, as well as the District Court's Memorandum of Decision. The issue presented was purely legal in nature.

Mr. Gorman's Pre-Sentence Report and Parole Commission Hearing Summary reflected two prior convictions and one prior incarceration. There is an indication that in January of 1971 he received a suspended sentence on a charge of mail theft. When Mr. Gorman was confronted with this entry at his parole hearing, he denied the same, stating that it was not his charge, but was taken in error from his co-defendant's record. A review of the F.B.I. record by the Parole Commission did not indicate an arrest or conviction for that offense and, accordingly, the same was expressly ignored by the Commission. The Government was not able to reconstruct further the facts surrounding this alleged incorrect information in its response in the District Court due to the difficulty of retrieving its file from storage. The Court file was in the possession of the District Court which ruled on the Motion. The Government, accordingly, assumed without conceding for purposes of its response that the mail theft matter was, in fact, inaccurately attributed to the Appellant. The Government took the position that the alleged inaccuracy clearly did not influence the denial of parole and that the question of its relationship to the sentence could be answered directly only by the sentencing Judge. The Judge who ruled on this § 2255 Motion was the same Judge who sentenced Mr. Gorman. In his Memorandum of Decision, Judge Zampano expressly articulated the reasons why his sentence would not have been different if the questioned conviction had been omitted from the pre-sentence report or its invalidity brought to his attention at the time of sentencing.

ISSUES PRESENTED

Did Allegedly Inaccurate Information in the Pre-Sentence Investigation Taint the Validity of Either Mr. Gorman's Original Sentence or his Parole Denial.

ARGUMENT

I. Alleged Misinformation in Appellant's Pre-Sentence Report Did Not Invalidate his Sentence.

As a matter of law, it is clear that incorrect information as to prior criminal conduct or prior convictions found to be constitutionally invalid in a Pre-Sentence Report which has been specifically relied on by the Court in sentencing and which has not been disclosed to the defendant, can be the basis for re-sentencing. *Townsend* v. *Burke*, 334 U.S. 737 (1948); *United States* v. *Tucker*, 404 U.S. 443 (1972) and *Baker* v. *United States*, 388 F.2d 931 (4th Cir. 1968). This so called "Townsend-Tucker" principle has generally arisen, however, from a particular factual analysis of individual cases. It has thus generally been required either that a sentencing Judge specifically relied on the misinformation, *United States* v. *Malcolm*, 432 F.2d 809, 815-816 (2d Cir. 1970); *United States* v. *Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973) or that it was not improbable that the sentencing Court so relied in light of all the circumstances of the case, *McGee* v. *United States*, 462 F.2d 243 (2d Cir. 1972); *United States* v. *Harris*, 558 F.2d 366, 374-375 (7th Cir. 1977). Running throughout these cases is the theme that the mere presence of inaccurate information is not a basis for resentencing. It is further required that the sentence be significantly influenced by the same. The Appellant himself recognizes this principle when, on page five of his Brief, he cites *United States* v. *Tucker*, *supra*, for the proposition that a Trial Judge, in exercising his

sentencing discretion, may not rely *significantly* upon false evidence of prior convictions. It has also been held that the party seeking relief has the initial burden of showing that the Court relied on the misinformation, *Shelton* v. *United States*, 497 F.2d 156 (5th Cir. 1974).

To be considered in conjunction with the above body of law is a long line of cases which hold that resentencing is not necessary if the Judge is able to state unequivocally on the record that the sentence would not have been different if the information had been known. *Wilsey* v. *United States*, 496 F.2d 619 (2d Cir. 1974); *United States* v. *Herman*, 524 F.2d 1103, 1104 (2d Cir. 1975); *Ferranto* v. *United States*, 507 F.2d 408 (2d Cir. 1974); *Schawartzberg* v. *United States*, 382 F.2d 1012 (2d Cir. 1967), *cert. denied*, 391 U.S. 928 (1968); *United States* v. *Janiec*, 464 F.2d 126, 132 (3rd Cir. 1972); *Brown* v. *United States*, 483 F.2d 116 (4th Cir. 1973); *Dukes* v. *United States*, 492 F.2d 1187 (9th Cir. 1974); *Wren* v. *United States*, 540 F.2d 643 (4th Cir. 1975); *Stepheney* v. *United States*, 516 F.2d 7 (4th Cir. 1975); *Rogers* v. *United States*, 466 F.2d 513 (5th Cir. 1972), *cert. denied*, 409 U.S. 1046 (1972); and *Duke* v. *United States*, 396 F. Supp. 149 (D.C. N.Y. 1975).

In this case, Judge Zampano's decision was well within the parameters of the above legal principles when it stated in relevant part:

> The short answer to this contention is that this Court states with assurance that even if the questioned conviction had been omitted from the presentence report or its invalidity brought to the Court's attention at the time of sentencing, it would not have resulted in a lighter sentence. Influencing factors for the fifteen year sentence imposed by this Court included the following: The Petitioner was involved in a serious Bank Robbery in which a loaded weapon was displayed and $48,000 stolen;

his prior record included a conviction for attempted robbery for which he had been incarcerated; he was on parole at the time of the instant offense; he was severely addicted to narcotics; and his co-defendant Roche received a 17 year sentence for his participation in the instant offense. For these reasons, this Court believes the sentence was reasonable and fair and, under these circumstances, the petitioner's request to be re-sentenced is denied.

II. Alleged Misinformation in Appellant's Pre-Sentence Report Did Not Invalidate his Parole Denial.

Although he alleges his Parole Denial to be an issue in this Appeal, Mr. Gorman does not discuss the same in his Brief. Judge Zampano's decision is very clear on that point and affords little room for disputation. Since the record of the parole proceedings specifically refers to the conviction in question and certifies that it was "ignored", and because the parole decision is clearly supported by Mr. Gorman's serious prior and subsequent anti-social conduct, it is clearly not an abuse of discretion and, thus, accordingly unworthy of Appellate judicial relief.

CONCLUSION

For all the above cited reasons, it is respectfully submitted that the Opinion of the District Court was correct and should be affirmed.

Respectfully submitted,

RICHARD BLUMENTHAL
United States Attorney

By: FRANK H. SANTORO
Assistant United States Attorney

APPENDIX

Memorandum of Decision

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. N-77-330

ROBERT WILLIAM GORMAN

v.

UNITED STATES OF AMERICA

Petitioner, presently incarcerated at the United States Penitentiary, Leavenworth, Kansas, seeks relief pursuant to a § 2255 motion on the grounds that an error in his presentence report was unlawfully relied on when 1) this Court sentenced him on March 22, 1965, and 2) the Parole Commission denied him parole on June 15, 1976.

After his conviction on two counts of bank robbery, the petitioner was sentenced by this Court to a term of 15 years on Count One and to probation on Count Two. The conviction was affirmed on appeal, without challenge to the sentence. *United States* v. *Gorman*, 355 F.2d 151 (2 Cir. 1965), cert. denied, 384 U.S. 1024 (1966). Subsequently, the sentence was modified slightly when the Second Circuit vacated the imposition of probation on the second count, leaving the 15-year term intact. *Gorman* v. *United States*, 456 F.2d 1258 (2 Cir. 1972).

On July 25, 1966, the petitioner was sentenced to another 15 years for bank robbery in the District Court for the District of Rhode Island, to run consecutively to the term imposed by this Court. Thereafter in the District Court for the Northern District of Georgia on October 17, 1969, he received a consecutive ten-year sentence for attempts to cause a mutiny and to escape. Thus he is presently serving an aggregated 40-year term.

Memorandum of Decision

I

It is not disputed that the presentence report incorrectly notes that the petitioner was convicted in 1961 of mail theft and burglary for which he received a suspended sentence in the District Court for the Eastern District of New York. Petitioner contends, however, that this Court probably relied on this inaccurate information to enhance a sentence which otherwise would have been imposed. Cf. *United States* v. *Tucker*, 404 U.S. 443 (1972); *Baker* v. *United States*, 388 F.2d 931 (4 Cir. 1968).

The short answer to this contention is that this Court states with assurance that even if the questioned conviction had been omitted from the presentence report or its invalidity brought to the Court's attention at the time of sentencing, it would not have resulted in a lighter sentence. Influencing factors for the 15-year sentence imposed by this Court included the following: the petitioner was involved in a serious bank robbery in which a loaded weapon was displayed and $48,000 stolen; his prior record included a conviction for attempted robbery for which he had been incarcerated; he was on parole at the time of the instant offense; he was severely addicted to narcotics; and his co-defendant Roche received a 17-year sentence for his participation in the instant offense. For these reasons, this Court believes the sentence was reasonable and fair and, under these circumstances, the petitioner's request to be resentenced is denied. Cf. *Wren* v. *United States*, 540 F.2d 643, 644 (4 Cir. 1975); *United States* v. *Hermann*, 524 F.2d 1103, 1104 (2 Cir. 1975); *Dukes* v. *United States*, 492 F.2d 1187, 1188 (9 Cir. 1974).

II

The petitioner also argues that the mistake in the presentence report deprived him of a meaningful parole consideration. The claim is without merit. The record

of the parole proceedings specifically refers to the conviction in question and certifies that the charge was "ignored" because the petitioner had informed the Hearing Examiners that the notation was erroneous and because a "review of the FBI sheet" failed to reveal an arrest or conviction on a charge of mail theft. Moreover, the reasons advanced by the parole officials for the denial of parole are substantial and more than adequately support the decision.

III

Since it is clear that the prior record section of petitioner's presentence report lists an erroneous mail theft and burglary conviction, it seems appropriate that this Court issue the following order:

> The Probation Office, District of Connecticut, shall retrieve all of its copies of the petitioner's presentence report which were forwarded to any source in order to expunge the inaccurate information. Thereafter, with the erroneous conviction excised, the reports may be resubmitted to the agencies involved.

IV

Accordingly, the petitioner's application for § 2255 relief is denied, except to the extent set forth in section III, supra.

Dated at New Haven, Connecticut, this 30th day of November, 1977.

/s/ ROBERT C. ZAMPANO
United States District Judge

Affidavit of Patricia L. Smith

State of Missouri)

County of Platte)

I, Patricia L. Smith, duly sworn on oath, depose and state as follows:

I am the Pre-Release Analyst for the United States Parole Commission, North Central Region, with offices in Kansas City, Missouri.

I have examined the file of Mr. Robert W. Gorman, register number 85933-132, and find as follows:

Mr. Gorman is presently serving an aggregated forty-year term for bank robbery and theft from a bank insured by the FDIC, robbery of a trust company insured by the FDIC, attempt to cause mutiny and riot at a federal institution and attempted escape. This term began on April 7, 1965 and expires on April 6, 2005. A copy of the sentence computation record is attached.

Mr. Gorman had his initial hearing at the U.S. Penitentiary, Leavenworth, Kansas on June 15, 1976. During the hearing the examiner panel discussed with Mr. Gorman his offense behavior, his prior record, institutional adjustment and social history items such as education, employment, marital and family status, and drug or alcohol dependence. The panel noted in its hearing summary that the presentence report stated Mr. Gorman received a suspended sentence in January 1961 for mail theft. However, in response to an objection from the prisoner, the examiner panel decided not to consider this conviction in its evaluation of Mr. Gorman's case since his FBI Identification Record did not list an arrest or conviction for the mail theft offense. Copies of the hearing summary and FBI Identification Record are attached.

After a referral of the case to the National Commissioners under 28 C.F.R. § 2.17, Mr. Gorman was in-

formed by a Notice of Action dated July 7, 1976 that he was continued for a statutory review hearing in June 1978. Reasons for parole denial were afforded to Mr. Gorman on the notice. [Copy attached].

Mr. Gorman filed an administrative appeal of the above decision to the entire Commission under 28 C.F.R. § 2.27 on August 4, 1976, but the previous decision remained unchanged.

/s/ PATRICIA L. SMITH

PATRICIA L. SMITH

Pre-Release Analyst

Subscribed to and sworn before me this 25th day of August, 1977.

.....

Notary Public

United States Board of Parole Hearing Summary

NC 5608

Name GORMAN, Robert William

Reg. No. 85933-132

Institution Leavenworth, Kansas

Member (or Examiner) Sartorius/Wright

Hearing Date 6-15-76

Type of hearing General Law and A-2 Initial

Projected MR Date: September 28, 1991

Full Term Date: April 6, 2005

OFFENSE & SENTENCE STRUCTURE: Subject was initially sentenced in the District of Connecticut on April 7, 1965, on the charge of bank robbery and theft from FDIC bank. He initially received a sentence of 15 years under regular adult procedure. Subsequently, on August 10, 1966, subject was sentenced in the District of Rhode Island, on the charge of robbery of an FDIC trust company, receiving a second 15-year sentence under regular adult procedure, this sentence to be consecutive to the one from Connecticut. Later, on October 17, 1969, in the District of Northern Georgia, subject was sentenced to a term of 10 years, A-2 procedure, consecutive to the other two sentences, on a charge of attempting to cause mutiny and riot at the U. S. Penitentiary, and attempted escape. The sentences have been aggregated to a total of 40 years. Subject was not given any credit for jail time, and at the present time has been in custody on this offense 132 months.

The offenses are as follows: On September 8, 1964, in Ridgefield, Connecticut, subject and a codefendant held up the Connecticut National Bank and obtained in excess of $1,000. Both were armed; the manager and a female

teller were locked in the vault. A total of $48,000 was stolen in the bank robbery and a stolen car was involved. Later, subject was sentenced on a bank robbery that occurred in Rhode Island. There is no information in the file pertaining to that robbery. According to subject, the robbery occurred in July 1964, at the Rhode Island Hospital Trust Company at Warwick, Rhode Island, in which some $9,924 was taken in that armed robbery.

While being confined at the Atlanta institution, subject was involved with several individuals in an attempt to escape. This occurred on June 11, 1968, when subject was charged with being out of bounds, holding hostages under duress, intimidating officials and employees, assaulting an officer, possession of dangerous contraband, guns and ammunition, destroying government property, (sawing security bars), shooting firearms on a federal reservation, threatening to kill, assault with a weapon and attempt to escape, and causing dangerous contraband to be introduced on a government reservation. Subject, with three other inmates, attempted to escape by sawing the bars in the restroom. The escape attempt was aborted, but subject and the three codefendants began taking hostages until some 23 employees were held hostage for some 27 hours before being released. They were threatened and intimidated. It does appear, however, that no one was injured in this escape attempt. It was on that charge that subject received the consecutive 10-year A-2 sentence.

At the time subject was involved in the initial bank robbery in Rhode Island and Connecticut, he was at that point under parole supervision from the State of New York, having been released on parole on 2-13-64 and absconding from supervision in April of 1964.

There is a detainer on file at this institution under date of October 28, 1969, charging parole violation, with the Division of Paroles, State of New York.

United States Board of Parole Hearing Summary

Codefendants: Edward T. Roche, a codefendant in the bank robbery. Subject indicates that he has a 17-year sentence and is confined at Marion.

Codefendants (on the Atlanta riot and escape): Frederick Freeman Leister, #88304-A; Daniel Ivan Neighbors, #90069-A; Ralph Michael Lepiscopo, #89373-A—Dispositions and locations unknown.

PRIOR RECORD: See salient factor score/presentence report. Subject has had two prior convictions and one prior incarceration. It does indicate that in January of 1961 on the charge of mail theft, he received a suspended sentence. Subject, however, states that this is not his charge, it was taken in error from the co-defendant's record. A review of the FBI sheet does not indicate an arrest for this charge or a conviction for that charge. Accordingly, this charge was therefore ignored. He has been placed on probation on one occasion, and in 1961 on attempted robbery, a 2½-5-year sentence in the New York State Penitentiary.

SOCIAL HISTORY ITEMS: Age/Date of Birth: Age 37; born July 11, 1938.

Schooling: 7th grade.

Work History: Was in the New York State institution January 1961 to February 1964, at which time he was paroled. Prior to that, he has been working as an exercise boy and a jockey at various race tracks from about 1951 through 1960 at various locations.

Marital/Family: Married in October 1955; divorced in approximately September 1975; three children of this marriage. He claims he is in touch with his two sons, ages 17 and 19, and he intends to make a home for them when he is released.

United States Board of Parole Hearing Summary

Drugs/Alcohol: The presentence indicates subject became addicted at the age of 14, developing a $15-$25 per day habit. Subject states that this did not develop into that much of a habit. He does acknowledge that he was at least psychologically addicted.

INSTITUTIONAL CONDUCT/PROGRAM ACHIEVEMENT/RELEASE PLAN: See the progress report of May 28, 1976. Subject was initially at Atlanta. In 1966, at the Adult Correctional Institution, Howard, Rhode Island, subject overpowered guards on duty there, and attempted to escape. This apparently occurred while he was awaiting court hearings and sentence on the second armed robbery offense out of the District of Rhode Island. He forfeited 153 statutory days. The details of the Atlanta escape attempt have been previously indicated in the foregoing, in which he forfeited 227 days. March 20, 1969, subject forfeited 60 days for fighting and creating a disturbance, was subsequently transferred to Marion, later transferred to Springfield in September after he had been stabbed by another inmate. He was transferred to Leavenworth in October 1969. In March 1971, he was involved in a work strike, and his most recent disciplinary report is in March 1976 for refusing to obey an order and running from a guard. Subject was found guilty and has forfeited 60 days statutory good time, which time is still outstanding. During the hearing, subject indicates that this is on administrative appeal because he does not feel he is actually guilty of the charge.

Subject has completed his high school education at Leavenworth, and in addition, has now completed some 45 hours of college credit, some of which is in the computer programming field. In addition, he has completed several welding courses and has been involved in the lab as a clinical lab technician. Subject indicated a release planning, if not to the detainer should they not exercise the

detainer, he would first of all prefer to relocate in Kansas City, Missouri, where he now has a girl friend, Marilyn Scholten. His second choice would be to return to the Atlanta area and through a community treatment center there. He has relatives residing in the New York area but has very infrequent contact with them.

REPRESENTATIVE IDENTIFICATION & COMMENTS: Subject had a representative, Mr. Robert Hedrick, Attorney at Law, 747 Ann Avenue, Kansas City, Kansas. Mr. Hedrick presented the panel with a written statement in support of the parole application which is attached. He went over this statement in detail. He recommended at this time that subject be given favorable consideration for parole release.

EVALUATION: Although subject has not had too much of a prior record, he certainly has been involved in a series of quite severe criminal activity since his initial confinement on the original bank robbery charge in 1965. After discussion on the part of the panel, it was decided that although this is a 40-year aggregated sentence, the panel was of the opinion that because of the publicity and the escape attempt which involved hostages in 1968 at the Atlanta institution, that this case should be referred for original jurisdiction consideration. Therefore, the following tentative decisions are rendered.

TENTATIVE DECISION:

1—Refer for original jurisdiction consideration.

2—Continue for statutory review hearing June 1978.

REASONS FOR CONTINUANCE: Your offense behavior has been rated as greatest severity because of multiple offenses, and taking hostages. You have a salient factor score of 4. You have been in custody a total of 132 months. Guidelines established by the Commission for adult cases which consider the above factors indicate

United States Board of Parole Hearing Summary

a range of 55+ months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that your release at this time would depreciate the seriousness of your offense behavior and thus is incompatible with the welfare of society. Commission guidelines for greatest severity cases do not specify a maximum limit. Therefore, the decision in your case has been based in part upon a comparison of the relative severity of your offense behavior with offense behaviors (and time ranges specified) in the very high severity category.

You have had serious and repeated institutional disciplinary infractions.

Received
Jun 23 1976

United States Board of Parole

★ U. S. Government Printing Office 1978— 714-063-ACT-307

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 77-2154

U. S. A.,
APPELLEE

VS.

ROBERT WILLIAM GORMAN,
APPELLANT

3/3

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue, Brooklyn, New York

That on the 3rd day of March, 1978, deponent served the within Brief upon Mr. Robert William Gorman, Pro Se, U.S. Penitentiary, P.O. Box 1000, Leavenworth, Kansas 66048

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Albert Sensale

Sworn to before me,

This 3rd day of March, 1978

PATRICIA D. O'HARA, Notary Public
State of New York No. 31-4654002
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 1979

Patricia D. O'Hara